# INTERAGENCY ADVISORY GROUP

UNITED STATES OF AMERICA
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

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Minutes of the IAG Employee Relations Committee
November 16, 1979

The meeting was chaired by Wilma Lehman, Acting Chief of the Employee Relations Branch, WED, assisted by Craig Pettibone and Mary Sugar of OPM's Compensation Group.

Questions associated with the use of fitness-for-duty examinations

Craig Pettibone, who is Director, Office of Pay and Benefits Policy Compensation Group, Office of Personnel Management, discussed some of the background of fitness-for-duty examinations and the problems connected with them. The Bureau of Retirement, Insurance, and Occupational Health earlier provided the guidance on these examinations, because of the presence of medical staff in that Bureau, even though the examinations were used in connection with many other actions besides retirement. The Compensation Group, encompassing several functions of the old BRIOH, currently is working on revisions to the requirements in chapter 339 for fitness-for-duty examinations used to determine both mental and physical fitness for several purposes. Problems have arisen when the employee is asked to take a fitness-for-duty examination in connection with possible mental or psychological disability. In some cases, the agency may improperly use the threat of a fitness-for-duty examination to coerce the employee into filing for a so-called "voluntary" action -- retirement, resignation, etc. Representative Spellman, in her study of the use of these examinations, was especially concerned with such coercion.

Mr. Pettibone believes that the requirements of Supplement 831-1 for psychiatric examinations with minor modifications are sufficiently stringent to avoid abuse, while those of chapter 339 may allow such abuse. It appears unfortunate to have the same examination used for different purposes and with different requirements. For ten years, CSC, and now OPM, have been looking for ways to solve the problems associated with the examinations, used with many programs besides retirement.

Those bodies making appellate decisions seem now to be implying a requirement for fitness-for-duty examinations in any case where adverse action would be based on possibly mentally aberrant conduct. This thinking goes along with long-time CSC advice to separate for disability rather than conduct as less stigmatizing to the employee. Mr. Pettibone mentioned the case discussed at the last month's meeting in which an individual appealed her removal for conduct, alleging mental handicap discrimination in that the agency did not direct a fitness-for-duty examination to determine her mental condition and make a reasonable accommodation to it. OPM's brief spoke to the discretionary rather than the obligatory nature of the use of these examinations. He asked the group how they used the examinations, if they could get along without them, under what authorities they believed the examinations could be taken, and whether more specific authorities were necessary.

One member questioned the use of agency-filed requests for disability retirement. He thought that an employee should in most cases be removed for the conduct or performance problem. If there was then an allegation of mental handicap, the appeal could be put in abeyance while the case was sent to OPM for a determination as to whether the person was mentally disabled and eligible to retire. Despite past rulings, the member suggested that Anderson v. Morgan was not in point in these cases. When asked whether a fitness-for-duty examination was necessary when the employee had less than five years of service, he said that the evidence obtained from it was important for the record, and that the courts have sustained removals for failing to report for such an examination.

Others said that a fitness-for-duty examination could give a prognosis as to whether an employee could be reassigned or given extended leave without pay if recovery seemed possible. They also agreed that the procedural safeguards of Supplement 831-1 should be given to employees with less than five years' service, if the authority existed to do so, with specially trained physicians performing the psychiatric examinations. Reporting-for-duty examinations should be required for those returning after lengthy mental illnesses. Mr. Pettibone said that such examinations could be built into the requirements of some jobs, with a clearer provision of authority if they were. A member felt management needs the authority to determine medical fitness for the job. Mr. Pettibone observes there is no specific statutory authority to check this once the person is on the job.

Some types of examinations for which there is authority were brought up by members:

-- DOT's return-to-duty examinations for Air Traffic Controllers, with a review by the Secretary of DOT of the examination results to determine whether the employee can safely return to duty, or if not, if a second career after training is possible or the employee will have to be separated.

-- Navy's periodic screening examinations for possible deleterious effects of noise, chemicals, or radiation in hazardous duty jobs. These are not fitness-for-duty examinations, but if a problem is found, then a fitness-for-duty examination with Supplement 831-1 procedures is used. Mr. Pettibone pointed out that such examinations were made under OSHA authority. The member agreed that the examination authority was inherent in the agency obligation to provide a safe environment.

Mr. Pettibone stated that more and more people are viewing the request to take a fitness-for-duty examination as more stigmatizing than an adverse action. A member agreed that the examination did appear stigmatizing, and that many supervisors hesitated to require its use because of this perception. He also said that the results of one psychiatric examination were in most cases not conclusive and not to be relied on as the basis for an action. When an employee's conduct or performance deteriorates, due to the nature of the illness the employee can often conceal it in a first examination. He believes that this accounts for the physician's hesitancy, and that under these circumstances the agency should take action and let the employee raise the issue of mental disability in his or her reply to the proposal.

Dr. Van Der Vlugt, the Director of the Medical Division of OPM's Compensation Group, said that fitness-for-duty requirements were promulgated for the purpose of protecting the employee. The examination is very effective when the requirements are carefully followed. Dr. Van Der Vlugt cannot favorably look upon

"dereculating" use of the fitness-for-duty examination. (Note: The new Director of the Medical Division will be George Smith.)

Members discussed the situation where an employee was possibly mentally disabled and whose misconduct on the job has been so serious that he or she cannot be kept on the job because of public discredit to the agency. They felt such employees could ultimately be given annuities if truly disabled, but should be separated at once as unable to function on the job. They again talked of the problem where a physician performing a psychiatric evaluation refused to commit himself on an employee's possible disability.

Another discussion followed as to what "reasonable accommodation" involved: counseling, training, job restructuring, reassignment or demotion, or removal if there are no other alternatives. Several felt that fitness-for-duty examinations would make these choices clearer. Mr. Pettibone asked members for any further suggestions or recommendations and said that his office would be circulating a draft paper.

Proposed changes to within-grade regulations in Part 531

Mary Sugar of the Compensation Group noted that she now works for Craig Pettibone. She regretted that copies of the proposed changes to Part 531 were not yet ready but would be sent through the IAC Secretariat as soon as possible. (These have now been mailed to committee members).
She is addressing two primary concerns in her draft:

1. The procedures for denying within-grade increases;
2. The need after CSRA to link acceptable level of competence determinations to 430 requirements.

A question was raised concerning a determination of unacceptable performance early in the two or three year waiting period for a within-grade increase, followed by an improvement in performance. Must the agency deny the with-in-grade increase at the end of the period? Mrs Sugar said this would be a judgemental decision, based on performance during the entire waiting period.

Chapter 43 requires that appraisals be used as bases for rewards. According to many agency plans, there is a problem in that appraisals are done on a single anniversary date, whereas within-grade increases come due at all times. The draft provides that any decision on the acceptable level of performance has to be based on an appraisal not more than 60 days old. In response to members' questions, she said that the decision must be based on performance during the whole waiting period, i.e., on two or three appraisals if the waiting period is more than one year.

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Note: There was not time to provide a report on Part 752 MSPB decisions at the meeting. As of November 15, we had received 560 substantive decisions by MSPB, of which 476, or 85%, sustained the agency, 28, or 5%, reversed the agency action for harmful error, and 56, or 10%, reversed the agency action for merit reasons. Some cases of interest to members:
-- A decision on removal for AWOL and incapacitation for the performance of duties because of prior indulgence in intoxicating liquors. This decision has a good discussion of the lack of immunity against adverse action for an employee whose drinking continues to cause unsatisfactory job-related

situations. (PM75209012, 10/26/79).

-- A decision on an action based on an arbitrator's award: A demotion (sustained), was made in compliance with an arbitrated grievance decision to correct an administrative error under the terms of the national agreement (CP75209017, 11/14/79).

-- A decision on a case where both unapproved and approved leave were the bases for a removal action: The decision sustained the use of approved leave in conjunction with the AWOL to support the removal penalty. (DA75209026, 11/15/79).